(4)

No. 90-792

Supreme Court, U.S.
FILED
JAN 22 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. AND CARGILL, INC.,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ALBERT J. BEVERIDGE, III *
VIRGINIA S. ALBRECHT
THOMAS C. JACKSON
DAVID G. ISAACS
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 789-6000
Attorneys for Amicus Curiae Foundation for Environmental and Economic Progress

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THIS CASE WARRANTS SUPREME COURT REVIEW BECAUSE THE NINTH CIRCUIT'S DECISION IMPROPERLY EXPANDS THE CORPS' REGULATORY AUTHORITY TO VIRTUALLY ANY PROPERTY	5
II. THE NINTH CIRCUIT'S DECISION IS UNSUPPORTED BY THE LEGISLATIVE HISTORY OF THE ACT	9
A. The Migratory Bird Policy Is Unrelated to the Act's Purpose of Protecting Water Quality	9
B. The Corps' Interpretation of the Act is Not Entitled to the Deference Typically Accorded to an Agency's Interpretation of a Statute	11
III. SUPREME COURT GUIDANCE IS REQUIRED TO RESOLVE THIS IMPORTANT ISSUE THAT HAS DIVIDED THE COURTS OF APPEALS	14
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page

Bowen v. American Hospital Ass'n, 476 U.S. 610 (1986) 11

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 11

Daniel Ball, The v. United States, 77 U.S. (10 Wall.) 557 (1871) 10

Economy Light & Power Co. v. United States, 256 U.S. 113 (1921) 10

Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990) ..... *passim*

Leslie Salt Co. v. United States, 700 F. Supp. 476 (N.D. Cal. 1989) 6

Lowe v. Security and Exchange Comm'n, 472 U.S. 181 (1985) 11

Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) 12

Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941) 10

Tabb Lakes, Ltd. v. United States, 885 F.2d 866 (Table) (4th Cir. 1989), 20 Env. L. Rep. (Env. L. Inst.) 20008 (4th Cir. 1989) (per curiam) 15

United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) 10

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) ..... *passim*

Utah v. United States, 403 U.S. 9 (1971) 10

STATUTES:

Administrative Procedure Act

5 U.S.C. § 553 14

Clean Water Act

33 U.S.C. § 1251(a) 10

33 U.S.C. § 1344 3

33 U.S.C. § 1344(c) 4

33 U.S.C. § 1362(7) 4

REGULATIONS:

33 C.F.R. § 209.120(d)(2) 12

33 C.F.R. Pt. 320-330 (1990) 4

TABLE OF AUTHORITIES—Continued

Page

33 C.F.R. § 328.3(a) (1990) 5, 14
40 C.F.R. § 328.3(a)(3) (1990) 6
40 C.F.R. § 328.3(b) (1990) 6
40 C.F.R. Pt. 230 (1990) 4
40 C.F.R. Pt. 230.3(s) (1990) 5

FEDERAL REGISTER:

40 Fed. Reg. 31,320 (July 25, 1975) 12
51 Fed. Reg. 41,206 (November 13, 1986) 14
55 Fed. Reg. 24,138 (June 14, 1990) 6

LEGISLATIVE HISTORY:

Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 99th Cong., 1st Sess. (1985) 12-13
S. Rep. No. 414, 92d Cong., 1st Sess. (1971), *reprinted in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (1973) 11
S. Rep. No. 1236, 92d Cong., 2nd Sess. (1972), *reprinted in* 1 Legislative History of the Water Pollution Control Act of 1972 (1973) 9
118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell), *reprinted in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972 (1973) 10

MISCELLANEOUS:

In The Matter of the Hoffman Group, Inc., CWA Appeal No. 89-2 (November 26, 1990), *Notice of Appeal filed* (7th Cir. December 16, 1990) 7, 8
In The Matter of the Hoffman Group, Inc., Docket No. CWA-88-AO-24 (September 15, 1989) 8, 9
EPA Memorandum from Francis S. Blake, General Counsel, to Richard E. Sanderson, Acting Assistant Administrator, "Clean Water Act Jurisdiction over Isolated Waters" (1985) 13

TABLE OF AUTHORITIES—Continued

Page

John P. Elmore, Directorate of Civil Works, and David G. Davis, Director, Office of Wetlands Protection, "Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*" (January 1990).. 15

Patrick J. Kelly, Brigadier General, U.S. Army, Deputy Director of Civil Works, "EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters" (1985) 5, 14

F. Dunkle, Fish and Wildlife Service, R. Hanmer, Environmental Protection Agency, R. Page, Department of Army, W. Scaling, Soil Conservation Service, Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989) 6

U.S. Fish and Wildlife Service, Wetlands of the United States: Current Status and Recent Trends (1984) 7

"Wetlands Preservation Law Draws Complaints in Md.," The Washington Post (February 20, 1990) 6

Comments of David A.C. Carroll, Governor's Chesapeake Bay Coordinator, submitted to the Corps (July 27, 1990) 6

Comments of Commissioners of Chatham County, submitted to the Corps (July 25, 1990) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-792

LESLIE SALT CO. AND CARGILL, INC.,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Foundation for Environmental and Economic Progress (the "Foundation") respectfully files this brief as *amicus curiae* in support of Petitioners. The Foundation has obtained written consent from counsel for Petitioners and Respondents to file this brief. The consent letters have been filed with the clerk's office.

INTEREST OF *AMICUS CURIAE*

The Foundation is a non-profit corporation whose members include over 15 real estate and community developers. The Foundation's members are involved in the development of large-scale commercial and residential projects throughout the country, and, as a result, have substantial experience with the regulation of wetlands

and other waters of the United States under Section 404 of the Clean Water Act. Accordingly, the Foundation believes it can assist the Court in obtaining an additional perspective on the issue presented in the underlying case. Moreover, because the question raised in this case restricts the development potential of vast areas of land, this Court's resolution of the issue presented would be of great significance to the Foundation's members and a substantial number of similarly situated developers and landowners.

SUMMARY OF ARGUMENT

The issue in this case is the scope of the U.S. Army Corps of Engineers' regulatory jurisdiction under Section 404 of the Clean Water Act. The U.S. Court of Appeals for the Ninth Circuit held in the decision below that federal jurisdiction extends to isolated areas which pond after rainfall because such areas "may" be used by migratory birds and therefore could affect interstate commerce. The Supreme Court should grant the petition for a writ of certiorari because of the pressing need for Supreme Court guidance regarding the proper scope of federal regulatory authority under Section 404.

The "migratory bird" policy is of critical importance to any person who wants to use and develop property. The Ninth Circuit's approval of this policy gives the federal government authority to regulate virtually any property determined to be a "water" simply because the property "could" be used by migratory birds, even absent actual use. The Corps of Engineer's migratory bird policy, coupled with its recent policy claiming jurisdiction over previously unregulated "waters," constitutes a broad expansion of federal regulation under the Clean Water Act. Such a major expansion of regulatory authority should not be approved by this Court absent evidence that Congress had granted this authority, which is not present here. Furthermore, the Corps' interpretation of the Clean Water Act is not entitled to deference since

the policy did not emerge from its experience indicating that the assertion of such authority was necessary to effectuate the goals of the Act.

Finally, the Fourth Circuit has held that the Corps' migratory bird policy is invalid, while the Ninth Circuit has upheld this policy. This Court should resolve this split between the circuits.

ARGUMENT

The present case involves the issue left unresolved in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985): whether the U.S. Army Corps of Engineers (the "Corps") has authority under the Clean Water Act (the "Act") to regulate isolated waters that are not adjacent to and have no hydrological or other connection to navigable waters.[1] In the case below, a divided panel of the Ninth Circuit held that the Corps' regulatory jurisdiction under the Act extends to isolated waters that are unconnected to other "waters of the United States," simply because such areas "may" be used by migratory birds. *See Leslie Salt Co. v. United States*, 896 F.2d 354, 355, 360 (9th Cir. 1990). Accordingly, this case tests the limits of federal authority under Section 404 of the Act, 33 U.S.C. § 1344.

Under Section 404, a person must obtain a permit from the Corps in order to discharge dredged or fill ma-

---

[1] In *Riverside Bayview*, the Court held that the Corps' jurisdictional authority extended to the regulation of intrastate wetlands that are "adjacent" to other "waters of the United States." *Id.* at 131-39. The Court, however, expressly declined to rule on the validity of federal jurisdiction over the type of waters at issue here: intrastate, isolated waters (*i.e.*, waters that are neither navigable nor adjacent to navigable waters). *See id.* at 131 n.8 ("We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . and we do not express any opinion on that question").

terial into "navigable waters." The term "navigable waters" is defined as "the waters of the United States, including the territorial seas." *Id.* at § 1362(7). The Act does not define the phrase "waters of the United States"; instead, this phrase has been defined by the Corps and the U.S. Environmental Protection Agency ("EPA")[2] in identical regulations. The Corps' and EPA's regulatory definitions of "water of the United States" include, in relevant part, the following:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All *other waters* such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, *the use, degradation or destruction of which could affect interstate or foreign commerce* including any such waters:
>
> > (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> >
> > (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> >
> > (iii) Which are used or could be used for industrial purpose by industries in interstate commerce[.]

---

[2] The Corps has primary administrative responsibility for implementing Section 404 of the Act, including the initial review of permit applications in accordance with both its own regulations, *see* 33 C.F.R. Pts. 320-330 (1990), and EPA's regulations governing Section 404 permits. *See* 40 C.F.R. Pt. 230 (1990). EPA has authority to "veto" the Corps' permit decisions. *See* 33 U.S.C. § 1344(c).

33 C.F.R. § 328.3(a) (1990) (emphasis added). *See also* 40 C.F.R. § 230.3(s) (1990).

It is noteworthy that these regulations do not include use or potential use by migratory birds as a basis for asserting jurisdiction over isolated waters.[3] Notwithstanding this regulatory omission, the Ninth Circuit held that the Corps has jurisdiction over isolated waters simply because migratory birds "may" use these waters. *See Leslie Salt Co.*, 896 F.2d at 360.

I. THIS CASE WARRANTS SUPREME COURT REVIEW BECAUSE THE NINTH CIRCUIT'S DECISION IMPROPERLY EXPANDS THE CORPS' REGULATORY AUTHORITY TO VIRTUALLY ANY PROPERTY

Under the Ninth Circuit's reading of the geographic scope of the Corps' authority under Section 404, the Corps may regulate virtually any property.

In determining whether to assert jurisdiction over a parcel of land, the Corps employs a two-part test. First, it determines whether the area is a "water," and then whether it is jurisdictional because of its effect on interstate commerce. One category of "waters" is open bodies of water such as rivers, streams, and lakes. The Corps, however, has expanded this concept to include areas that rarely contain water at the surface. In *Leslie Salt*, for example, the "waters" at issue are small, man-made pits that pond at times during the winter rainy season. As the district court recognized, "[a]ny land subjected

[3] As discussed below, *see infra* at 12-14, the Corps did not develop the migratory bird policy until 1985 as a result of oversight hearings before a Senate subcommittee. After those hearings, the Corps issued an unpublished internal memorandum to its district offices directing them to assert jurisdiction over isolated waters on the basis of use or potential use by migratory birds. *See* Patrick J. Kelly, Brigadier General, Deputy Director of Civil Works, "EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters" (November 8, 1985) (copy lodged with Clerk's Office).

to enough temporary rainfall will collect water which stands until it runs off or percolates into the ground." *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 483 (N.D. Cal. 1989), *rev'd*, 896 F.2d 354 (9th Cir. 1990).

The other principal category of "waters" is "wetlands." *See* 33 C.F.R. §§ 328.3(a)(3); 328.3(b) (1990). Under the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands," the criteria for identifying "wetlands" are so broad that the term includes areas with no discernible water for most of the year.[4] An area will be considered to be at wetland even if water is never present at the surface; it is sufficient if the underground water table rises to within 18 inches of the surface for as little as seven days during the growing season.[5]

When this expansive definition of "waters" is combined with the Corps' migratory bird policy, vast areas

---

[4] The expansion of the Corps' jurisdiction since issuance of the Manual has been dramatic, particularly in coastal areas. For instance, the governor's office in Maryland has stated that the Manual has resulted in the regulation of "hundreds of thousands of areas not previously subject to federal jurisdiction." *See* Comments of David A.C. Carroll, Governor's Chesapeake Bay Coordinator (July 27, 1990), submitted to the Corps in response to notice in 55 Fed. Reg. 24138 (June 14, 1990) (copy lodged with Clerk's Office). The jurisdictional wetlands in one Maryland county have been estimated to have increased more than five-fold as a result of the Manual; indeed, some Maryland counties may now contain up to 65 percent wetlands under the Manual. *See* "Wetlands Preservation Law Draws Complaints in Md.," The Washington Post, February 20, 1990, p. A1. Similarly, under the Manual as much as 75 percent of Chatham County, Georgia qualifies as jurisdictional wetlands, representing an increase of over 50 percent. *See* Comments of Commissioners of Chatham County (July 25, 1990), submitted to the Corps in response to notice in 55 Fed. Reg. 24138 (June 14, 1990) (copy lodged with Clerk's Office).

[5] *See* F. Dunkle, Fish and Wildlife Service, R. Hammer, Environmental Protection Agency, R. Page, Department of Army, W. Scaling, Soil Conservation Service, Federal Manual for Identifying and Delineating Jurisdictional Wetlands §§ 2.8, 2.9 (January 1989).

of previously unregulated land are brought within Corps jurisdiction. Birds travel throughout the Western Hemisphere and may potentially use any land in the United States. In one study, for example, birds marked in North Dakota were recovered in 46 states, ten Canadian provinces and territories, and 23 other countries.[6] In addition, actual "use" by birds is not even required; potential use is sufficient. There is no minimum size requirement, nor does it matter whether birds use the site for nesting, feeding, or breeding, or simply as a place to fly over and land. Similarly, federal jurisdiction is exercised regardless of whether the use is regular and ongoing, or more limited, such as seasonal, temporary, or even a single incident of bird "use." Likewise, any bird will qualify—non-water dependent species such as robins, sparrows, and bluejays, are treated identically to waterfowl such as Canada geese and mallards. All that matters is that the bird happens to cross a state line.

The effect of the Ninth Circuit's decision is to enable the Corps to regulate minuscule depressional areas in the midst of, for example, upland corn fields, simply because the depressional areas collect water after rainfall or experience a "high" water table for a short time during the spring if the area could be used by birds.

The Foundation is aware of several instances in which the federal government has asserted jurisdiction over areas that are a mere fraction of an acre. For example, in *In the Matter of the Hoffman Group, Inc.*,[7] the government sought a $125,000 administrative penalty for an alleged filling of "waters of the United States," which included a 0.8-acre clay-lined depressional area located in a 40-acre

---

[6] *See* U.S. Fish and Wildlife Service, Wetlands of the United States: Current Status and Recent Trends 1 (1984).

[7] *See In the Matter of the Hoffman Group, Inc.*, CWA Appeal No. 89-2 (November 26, 1990), *notice of appeal filed*, (7th Cir. December 19, 1990) (copy lodged with Clerk's Office).

cornfield in Cook County, Illinois. The landowner appealed the administrative penalty, and, after a hearing, EPA's Chief Administrative Law Judge ("ALJ") determined that this tiny piece of land had no surface or groundwater connection with any other water body; it became wet after rain and dried through evaporation.[8] The ALJ also found that there was no evidence that migratory birds actually used the area, or that the area "contains any characteristic that would render it any more attractive to birds than any other land that at one time or another contains water." *Id.* at 48. Indeed, the ALJ noted that the government's expert had testified that birds would use any site: "I have seen ducks sitting in puddles in a parking lot." *Id.* at 48. Holding that the government had to establish more than the "theoretical possibility" that the area could be used by migratory birds, *id.* at 49, the ALJ rejected the government's assertion of jurisdiction over this area and reduced the penalty to $50,000.

The EPA regional office appealed this ruling to EPA's Chief Judicial Officer, claiming that "potential" use is sufficient for federal jurisdiction. EPA's Chief Judicial Officer agreed and reinstated $50,000 in penalties with respect to the 0.8-acre area that will filled. Although the Chief Judicial Officer accepted the ALJ's findings that this area had no relationship to other waters and that it was not actually used by migratory birds, the Chief Judicial Officer concluded that this area was a "water of the United States" because it "could" be used by migratory birds.[9]

As the Chief ALJ observed in *Hoffman*, if the isolated 0.8-acre depressional area is a jurisdictional "water of

---

[8] *In the Matter of the Hoffman Group, Inc.*, Docket No. CWA-88-AO-24 at 45, 45 n.133 (September 15, 1989), *rev'd on other grounds*, CWA Appeal No. 89-2 (November 26, 1990) (copy lodged with Clerk's Office).

[9] *In the Matter of the Hoffman Group*, CWA Appeal No. 89-2 at 25 (November 26, 1990).

the United States," the decision "is tantamount to making all wetlands subject to Section 404 jurisdiction." [10] Without any minimum requirements as to size, type or frequency of use, or type of bird, the consequence of the Ninth Circuit's decision in *Leslie Salt* is to sweep countless isolated areas into federal jurisdiction regardless of their value in promoting water quality, their real effect on interstate commerce, or even their significance to migratory birds.[11]

II. THE NINTH CIRCUIT'S DECISION IS UNSUPPORTED BY THE LEGISLATIVE HISTORY OF THE ACT

A. The Migratory Bird Policy is Unrelated to the Act's Purpose of Protecting Water Quality

No one disputes that Congress intended to give the term "navigable waters" in the Act a broad interpretation. *See Riverside Bayview*, 474 U.S. at 132-39; S. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972), *reprinted in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972 at 327 (1973). This Court has stated:

> In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that

---

[10] *Hoffman*, Docket No. CWA-88-AO-24 at 49.

[11] The Act provides no mechanism for direct judicial review of jurisdictional determinations. Such determinations are subject to review only after a landowner has endured the lengthy and expensive permit application process and a permit has been denied, or the landowner defies the Corps and risks an enforcement action and large administrative penalties (up to $25,000 per day). Because of the expense and risk of seeking review under either method and the low value of most small isolated waters, few property owners have the resources to challenge the assertion of jurisdiction over these areas, even though this issue is of great importance to property owners. Accordingly, this case is an appropriate vehicle for this Court to review this important jurisdictional question. We believe that this is a significant practical reason why the petition should be granted.

> had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.

Riverside Bayview, 474 U.S. at 133.

Congress' concern was that the legislative objective of the Act—"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" [12]—could not be accomplished if the term "navigable waters" was restricted to its traditional meaning. The term "navigable waters" had historically been applied under the Commerce Clause to waters that serve as avenues of commerce. *See e.g., Utah v. United States*, 403 U.S. 9, 11 (1971).[13] While the traditional approach makes sense when the issue involves the shipment of goods, Congress recognized that it would be inadequate in protecting the Nation's water quality. With this goal in mind, Congress determined that the hydrological connection of

---

[12] 33 U.S.C. § 1251(a).

[13] The legislative history cites a number of Supreme Court cases expanding the definition of navigable waters. *See* 118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell), *reprinted in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972 at 250 (1973). These cases are *The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557, 563 (1871) (holding that a river was a navigable water because it was "navigable in fact" in its natural state and had the capacity to be used for interstate commerce); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-24 (1921) (a river having navigable capacity in its natural state but, as a result of various alterations and man-made obstructions was presently incapable of use for navigation is navigable); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940) (waters which are suitable for navigation by means of reasonable improvements are navigable). *See also Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508, 523-26 (1941) (Congress' authority extends to non-navigable tributaries of navigable waters). Simply because Congress sought to move beyond the definition of waters established in these cases, it does not follow that Congress intended to abandon the concept of navigability and regulate waters wholly unconnected to navigable waterways.

waters was of primary importance. As the Senate Committee on Public Works stated:

> Through narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof and their tributaries.

Comm. on Public Works, Federal Water Pollution Control Act Amendments of 1971, S. Rep. No. 414, 92d Cong., 1st Sess. 77 (1971), *reprinted in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972 at 1495 (1973). To the extent it is discernible, the congressional goal was to regulate water linked in the hydrological chain to navigable waters. Insofar as a "water" or "wetland" is isolated from the interconnected system, it will not affect the water quality of the system, and therefore its regulation is unrelated to the Acts purpose.

B. The Corps' Interpretation of the Act is Not Entitled to the Deference Typically Accorded to an Agency's Interpretation of a Statute

We recognize the general principle that courts should grant deference to an agency's construction of the statute it is entrusted to administer. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Courts typically give weight to an agency's statutory interpretation where, for example, the policy is formulated and justified in a "detailed and reasoned fashion," *id.* at 865, is announced contemporaneously with the enactment of the statute, *see Lowe v. Securities and Exchange Comm'n*, 472 U.S. 181, 216 (1985) (White, J., concurring), or has been interpreted in a consistent and longstanding manner. *See Bowen v. American Hospital Ass'n*, 476 U.S. 610, 646 n.34 (1986).

The migratory bird policy was not adopted until 1985, thirteen years after the enactment of the Federal Water Pollution Control Act Amendments of 1972, when the original debate over the reach of "waters of the United States" took place, and eight years after the Act's revision in 1977, when the jurisdictional issue was revisited by Congress.[14] The issue was first raised by one Senator during oversight hearings before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works. Seeking to extend federal regulation under the Act, Senator Mitchell asked the Acting Assistant Secretary of the Army, Civil Works, whether Corps jurisdiction under Section 404 reached isolated wetlands "used by migratory fowl, waterfowl, which establishes the interstate commerce basis for jurisdiction." [15] The witness declined to respond, stating that he needed legal advice prior to answering this question.[16] One month later, EPA's Acting Assistant Administrator

---

[14] The Corps initially applied a narrow definition of the term "navigable waters" after the enactment of the Federal Water Pollution Control Act of 1972, but a federal court ordered the Corps to promulgate new regulations. *See Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975). As a result, the Corps promulgated interim final regulations that expanded the definition of navigable waters to include traditional navigable waters and their non-navigable tributaries, coastal wetlands, interstate waters, inland wetlands adjacent to navigable waters, and intrastate waters utilized in interstate commerce for recreational, fishing, industrial, or agricultural purposes. *See* 40 Fed. Reg. 31320, 31324 (July 25, 1975). This definition was codified at the time at 33 C.F.R. § 209.120(d)(2).

[15] Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 99th Cong., 1st Sess. 115 (June 10, 1985) (statement of Sen. Mitchell).

[16] *Id.* It seems reasonable to conclude that if the migratory bird policy had already emerged as a reasoned outgrowth of the Corps' administration of the Act, the Army's highest officer in charge of the Corps' regulatory policies would have been able to answer this question at the hearing.

for External Affairs appeared before the same panel. Apparently prepared for the Senator's question, the Assistant Administrator listed several examples of effects on interstate commerce that would subject waters to regulation under the Act, including waters used as habitat by birds protected by Migratory Bird Treaties and waters used as habitat by other migratory birds which cross state lines.[17] Senator Mitchell questioned the witness' failure to include waters that "could be" used by migratory birds. *Id.* at 169-70. The Assistant Administrator then indicated a need to confer with counsel prior to answering this question.

Eight weeks later EPA gave the Senator the answer he wanted. In a legal memorandum, EPA General Counsel Francis S. Blake stated that "if the evidence reasonably shows that the waters 'are used or would be used' by migratory birds or endangered species, it is covered by EPA's regulation." [18] The Corps circulated this memorandum to its district offices, and the migratory bird policy came to life.[19]

Significantly, at the time the Corps was embracing the Senator's position, it was consolidating its various permitting regulations pursuant to the requirements of the Administrative Procedure Act, 5 U.S.C. § 553. Although

---

[17] *See* Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 99th Cong., 1st Sess. 163 (July 15, 1985).

[18] EPA Memorandum from Francis S. Blake, General Counsel, to Richard E. Sanderson, Acting Assistant Administrator of the Office of External Affairs, "Clean Water Act Jurisdiction over Isolated Waters" at 3 (September 12, 1985) (copy lodged with Clerk's Office).

[19] Patrick J. Kelly, Brigadier General, Deputy Director of Civil Works, "EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters" (November 8, 1985) (copy lodged with Clerk's Office).

one of the regulatory provisions under review was the definition of "waters of the United States," the Corps did not revise its definition to incorporate the new migratory bird policy. 51 Fed. Reg. 41206, 41250 (November 13, 1986) (*codified at* 33 C.F.R. § 328.3(a)).[20]

As this background demonstrates, the Corps did not have a "detailed and reasoned" justification that such broad jurisdiction is needed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Similarly, the migratory bird policy was not enunciated contemporaneously with the enactment of the Act, and the interpretation has not been applied in a consistent and longstanding manner. Instead, the policy appears to be the result of pressure by a single Senator. In the absence of clear congressional authorization or a demonstrated justification that such jurisdiction is needed to attain the purposes of the Act, the Corps' migratory bird policy is not entitled to deference by this Court.

III. SUPREME COURT GUIDANCE IS REQUIRED TO RESOLVE THIS IMPORTANT ISSUE THAT HAS DIVIDED THE COURTS OF APPEALS

The migratory bird policy has also divided the two Courts of Appeals that have reviewed this issue. As stated above, the Ninth Circuit held that the Corps may assert jurisdiction over isolated waters since they are encompassed within the regulatory definition of "other waters," because migratory birds use or could use these properties. *See Leslie Salt*, 896 F.2d at 360. Over one year ago, however, the Fourth Circuit invalidated the Corps' assertion of jurisdiction over isolated wetlands on

---

[20] The preamble to the regulations, which has no legal authority, noted, however, that "EPA has clarified that waters of the United States" also includes waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties" and "[w]hich are or would be used as habitat by other migratory birds which cross state lines." *Id.* at 41217.

the basis that they could be used by migratory birds. *See Tabb Lakes, Ltd. v. United States*, 885 F.2d 866 (Table), 20 Env. L. Rep. (Env. L. Inst.) 20008 (4th Cir. 1989) (per curiam). In that case, the Fourth Circuit determined that the Corps' migratory bird policy was announced in violation of the notice and comment provisions of the Administrative Procedure Act.[21]

This split among the courts of appeals has resulted in a lack of uniformity in implementing the geographic reach of Section 404 of the Act to isolated waters. In response to the Fourth Circuit's *Tabb Lakes* decision, the Corps and EPA issued a directive to their field offices stating that they would not apply the migratory bird policy in the Fourth Circuit (*i.e.*, the states of South Carolina, North Carolina, Virginia, West Virginia, and Maryland), but would continue to apply this policy outside these states.[22] This differing application of the reach of Section 404 lacks any legal or equitable basis, and warrants resolution by the Supreme Court.[23]

---

[21] The Ninth Circuit in *Leslie Salt* did not address the procedural issue raised by the Fourth Circuit in *Tabb Lakes*. Thus, we have focused on the substantive issues raised by the migratory bird rule. As the Fourth Circuit held in *Tabb Lakes*, however, we note that the Corps' failure to promulgate this rule in accordance with public notice and comment constitutes a violation of the Administrative Procedure Act and is an independent basis for reversing the decision of the court below.

[22] John P. Elmore, Directorate of Civil Works, and David G. Davis, Director of Office of Wetlands Protection, "Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*" (January 24, 1990), Petition for a Writ of Certiorari of Petitioners, Appendix E at A-46.

[23] The Corps also stated in this memorandum that the Corps and EPA "intend to undertake as soon as possible an [Administrative Procedure Act] rulemaking process regarding jurisdiction over isolated waters." *Id.* at ¶ 2, Petition for a Writ of Certiorari of Petitioners, Appendix E at A-48. More than 20 months after *Tabb Lakes* and one year after issuance of this memorandum, however, the Corps and the EPA have not initiated rulemaking on this issue.

CONCLUSION

This Court should grant the petition and clarify the extent of federal jurisdiction under the Act. The issue raised by this case affects property owners throughout the United States. If the decision of the Ninth Circuit is left to stand, the Corps can exercise jurisdiction over virtually any isolated "wet" area on the premise that it "could" be used by migratory birds. This result is unsupported by the legislative history of the Act, and is in conflict with another federal appellate decision. For these reasons, the Supreme Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ALBERT J. BEVERIDGE, III *
VIRGINIA S. ALBRECHT
THOMAS C. JACKSON
DAVID G. ISAACS
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 789-6000
Attorneys for Amicus Curiae Foundation for Environmental and Economic Progress

Dated: January 22, 1991

* Counsel of Record